



ICTR-2000-56-I  
26-03-2004  
(7712 — 7707)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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OR: ENG

**TRIAL CHAMBER II**

Before: Judge Arlette Ramaroson, Presiding  
Judge William H. Sekule  
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 26 March 2004

**The PROSECUTOR**  
v.  
**Augustin NDINDILYIMANA**

**Case No. ICTR-2000-56-I**

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**DECISION ON URGENT ORAL MOTION FOR A STAY OF THE INDICTMENT,  
OR IN THE ALTERNATIVE A REFERENCE TO THE SECURITY COUNCIL**

**The Office of the Prosecutor:**

Ciré Aly Bâ  
Alphonse Van  
Faria Rekkas  
Justus Bwonwonga

**Counsel for the Accused:**

Christopher Black

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (The "Tribunal"), 7711**

**SITTING** as Trial Chamber II composed of Judges Arlette Ramaroson, presiding, William H. Sekule, and Solomy Balungi Bossa (the "Chamber")

**BEING SEIZED** of Accused Augustin Ndindiliyimana's "Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council," filed on 16 May 2003 (the "Motion");

**HAVING RECEIVED AND CONSIDERED THE** "Prosecutor's Brief in Response to Motion Presented by Counsel for Augustin Ndindiliyimana for a Stay of the Indictment, Release of the Accused or, in the Alternative, to the Security Council," filed on 22 May 2003 ("Prosecution's Response"); **AND** the "Reply to Prosecutor's Response to Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council," filed on 27 June 2003 ("Ndindiliyimana's Reply");

**CONSIDERING** the Statute of the Tribunal (the "Statute"), in particular Article 15, 17 and 20, and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 5, 37 and 73;

**NOW DECIDES** the Motion on the basis of the written briefs as filed by the Parties pursuant to Rule 73(A) of the Rules.

**PRELIMINARY MATTER**

1. Judge Asoka de Zoysa Gunawardana is temporarily absent from the seat of the Tribunal. The President of the Tribunal, on 22 March 2004, has assigned *ad litem* Judges to Trial Chamber II to adjudicate over pre-trial proceedings pursuant to Article 12 *quarter* (d) of the Statute. Therefore, for purposes of deciding this Motion, the Trial Chamber is composed of Judges Arlette Ramaroson, presiding, William H. Sekule, and Solomy Balungi Bossa.

**SUBMISSIONS OF THE PARTIES**

*The Defence*

2. The Defence for Ndindiliyimana submits that there exists Prosecutorial abuse of process and non-compliance with the Statute and Rules of the Tribunal in the Prosecution's selective and discriminatory policy of not prosecuting the Rwandan Patriotic Front (RPF), and instead prosecuting only Hutus. Therefore, the Defence requests the Chamber, pursuant to Rules 5 (A) and 37, and Articles 15, 17 and 20 of the Statute, to stay the Indictment against the Accused, release him, or in the alternative, make a reference on this issue to the Security Council.
3. In support of its legal reasoning, the Defence cites *Regina v. Convoys*<sup>1</sup> in contending that a court may use its power "sparingly" to uphold the fairness to prevent abuse of process. Using *Convoys*, the Defence argues that if the abuse of process sufficiently outweighs the "societal interest" in criminal prosecution, even prosecutorial bad faith, and not only prosecutorial misconduct, may be sufficient for an abuse of process.
4. The Defence also cites other cases in Canadian and United Kingdom jurisprudence<sup>2</sup> in contending that a court has "residual discretion" to stay proceedings for an abuse of process.

<sup>1</sup> *Regina v. Convoys*, [1989] S.C.R. 1659.

<sup>2</sup> *Regina v. Jewitt*, [1985] 2 S.C.R. 128; *Regina v. Horseferry Road Magistrates Court ex Parte Bennet*, [1993] A.C. 42.95 1994 (House of Lords).

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5. The Defence finally cites *U.S. v. Armstrong*<sup>3</sup>, a United States Supreme Court case that proscribes selective prosecution on the basis of the U.S. Constitution's Due Process Clause of the Fifth Amendment if the "system of prosecution amounts to a practical denial of the law."
6. The Defence submits that the Prosecution has only indicted Hutus, and no RPF members or people associated with the RPF, for political rather than evidentiary reasons. It contends that the Office of the Prosecution has a "culture of impunity" towards the RPF.
7. The Defence submits that the Prosecution's alleged selective prosecution is, pursuant to Rule 5, an abuse of the Tribunal's process for non compliance with the Statute's Article 20(1)'s right to "equal protection of the law", and the duties and functions of the Prosecution set forth in Article 15 and 17 of the Statute, and Rule 37.
8. The Defence submits that the Prosecution has a mandate to prosecute the RPF whose crimes are within the Tribunal's geographic and temporal jurisdiction. He alleges that the RPF, based on supporting materials submitted with the Motion, has committed crimes of genocide, war crimes, crimes against humanity, and violations of the Geneva Convention stipulated in Article 2, 3, 4, 5 and 6 of the Statute.
9. The Defence alleges, based on a public interview with the then Prosecutor<sup>4</sup>, that no RPF members, agents, or allies will be indicted.
10. Defence requests, in the alternative, that the Chamber use its authority to refer the issue to the Security Council to clarify the role of the Prosecution concerning crimes committed by the RPF.

#### *Prosecution's Response*

11. The Prosecution submits that its mandate is temporal, and its schedule is not pre-determined. According to the Prosecution, Articles 15 and 17 of the Statute give it discretion consistent with the judicial principle of prosecutorial independence, and no one is empowered to prescribe proceedings to it. Further, the nature of prosecutorial discretion requires secrecy and confidentiality in its proceedings.
12. The Prosecution submits that, pursuant to Article 32 of the Statute, and Rule 7 *bis*, 11, 24, 59 and 61, only the President of the Tribunal is authorised to seek a Security Council reference, either through his annual report, or on the request of Chambers or the Prosecutor. The Prosecution also contends that Defence counsels are not empowered to request Security Council references.
13. The Prosecution seems to argue that Defence's reliance on Article 20 of the Statute is misplaced as the Statute deals solely with the treatment of the Accused by the Tribunal.
14. The Prosecution requests the Chamber to declare itself incompetent to rule on Prosecution's discretionary policy.
15. The Prosecution rejects the Defence's assumptions as hypothetical.

#### *Ndindiliyimana's Reply*

16. The Defence contends that the Prosecution does not deny the allegations of Hutu-specific selective prosecution, but argues only that its investigations are continuing. Also, the Defence

<sup>3</sup> *U.S. v. Armstrong*, 517 U.S. 456 (1996).

<sup>4</sup> Prosecutor Carla Del Ponte interview with the Hirondelle Press Agency on 19 December 2002.

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submits secrecy and confidentiality claimed by the Prosecution are not valid rationales for a lack of explanation on the Prosecution's alleged policy of selective prosecution.

17. The Defence rejects Prosecution's contention that the Chamber has no jurisdiction over prosecutorial discretion, and alleges it to be contemptuous of the Chamber. The Defence argues that the Chamber has jurisdiction to provide relief to an accused if the Prosecution abuses its discretion through selective prosecution.
18. The Defence argues that Prosecutorial discretion must be exercised reasonably. It reiterates its submission in the earlier Motion that prosecutorial misconduct is not required to prove abuse of process, as it is sufficient to show that one group is selectively targeted while the other is not.
19. The Defence also submits that the Chamber is authorized to make a reference to the Security Council. It further contends that the Defence, as mandated by the United Nations, under Article 19(1), and Rule 42, and 44 to 46 of the Code of Professional Conduct for Defence Counsel, must seek every legal remedy.
20. The Defence argues that Article 20 is not restricted to the Accused brought before the Tribunal.

#### HAVING DELIBERATED

21. The Defence seeks a stay of the Indictment, pursuant to Rule 5, which states, *inter alia*:

##### Rule 5: Non-Compliance with Rules

- (a) Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to that party.

The Chamber understands the Defence's convoluted argument to contend a non-compliance with Article 20 and Article 37, which state, respectively, *inter alia*:

##### Article 20: Rights of the Accused

4. All persons shall be equal before the International Tribunal for Rwanda.

##### Rule 37: Functions of the Prosecution

- (A) The Prosecutor shall perform all the functions provided by the Statute in accordance with the Rules and such Regulations, consistent with the Statute and the Rules, as may be framed by him. Any alleged inconsistency in the Regulations shall be brought to the attention of the Bureau to whose opinion the Prosecutor shall defer.

22. The Chamber reiterates, as the Prosecution contends, and consistent with the Tribunal's jurisprudence, that the Prosecution has "broad discretion in relation to the [...] preparation of indictments."<sup>5</sup> The Chamber observes that the "breadth of discretion of the Prosecutor, and the fact of [his] statutory independence, imply a presumption that the prosecutorial functions [...] are exercised regularly."<sup>6</sup>

<sup>5</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4, "Appeals Chamber Judgement", 1 June 2001, para. 94 (citing *Prosecutor v. Delalic et al.*, Case No. IT-96-21-A, "Appeals Chamber Judgement", 20 February 2001, para. 602 ("the "Celebici Appeals Judgement") (the "Akayesu Appeals Judgement").

<sup>6</sup> *Celebici Appeals Judgement*, para. 611.

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23. The Chamber, however, finds the Prosecution's submission, made without reference to any of the Tribunal's jurisprudence, that the Chamber declare itself incompetent to rule on the discretionary prosecution policy inconsistent with the Tribunal's jurisprudence. The *Celebici* Appeals Judgement, followed by the *Akayesu* Appeals Judgement<sup>7</sup> and the *Ntakirutimana* Judgement<sup>8</sup>, clearly establishes that the Prosecution's discretion is not absolute, but "is subject to the principle of equality before the law and to this requirement of non-discrimination."<sup>9</sup>
24. The Chamber finds no support for the Prosecution's contention that Article 20 is not applicable in this instant case.
25. The Chamber, despite Defence's failure to cite the relevant jurisprudence of the Tribunal<sup>10</sup>, and its reliance only on national sources, reaffirms the standard articulated in the *Celebici* Appeals Judgement, and followed in the *Akayesu* Appeals Judgement<sup>11</sup> and the *Ntakirutimana*<sup>12</sup> Judgement. The Chamber notes that the Defence has the high burden of rebutting the presumption of prosecutorial discretion, by:

- [ . . .](i) establishing an unlawful or improper (including discriminatory) motive for the prosecution; and
- (ii) establishing that other similarly situated persons were not prosecuted.<sup>13</sup>

26. The Chamber recalls the *Ntakirutimana* Judgement in which the Trial Chamber held that the Accused, alleging selective prosecution, must meet a high burden to show that his prosecution is based on "impermissible motives, such as ethnicity or political affiliation," In *Ntakirutimana*, the Chamber found that the Accused had not produced any evidence to satisfy the high threshold of proof.<sup>14</sup> The Chamber also observes the similar ruling in the *Akayesu* Appeals Decision, where the Appeals Chamber held that the "failure to prosecute crimes against the Hutu population" is insufficient in itself to prove the Prosecution's policy to be discriminatory.<sup>15</sup> In addition, in *Akayesu*, the Defence did not demonstrate "how the alleged discriminatory prosecution on policy pursued by the Prosecutor was so prejudicial to him as to put in issue the lawfulness of the proceedings instituted against him."<sup>16</sup> Thus, the Chamber rejects the Defence contention that it is sufficient to show that only one group is selectively targeted while another is not. In the instant case, the Chamber finds that the Defence has not adduced any evidence of the Prosecution's alleged impermissible discriminatory motives - besides the general allegation that the Prosecution has acted politically - to satisfy the high burden required to show abuse of prosecutorial discretion.

27. The Chamber notes that the *Ntakirutimana* Judgement concluded that:

In light of the failure of the Defence to adduce any evidence to establish that the Prosecutor had a discriminatory or otherwise unlawful or improper motive in indicting or continuing to

<sup>7</sup> *Akayesu* Appeals Judgement, para. 93-97.

<sup>8</sup> *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10, "Judgement", 21 February 2003, para. 870-871 (the "*Ntakirutimana* Judgement").

<sup>9</sup> *Celebici* Appeals Judgement, para. 605.

<sup>10</sup> The Tribunal's jurisprudence is consistent with the legal sources cited in support of the Defence submissions. However, as stated in the *Celebici* Appeals Judgement, "[i]t is unnecessary to select between domestic standards, as it is not appropriate for the Appeals Chamber simply to rely on the jurisprudence of any one jurisdiction in determining the applicable legal principle. The provisions of the Statute [ . . . ] and the relevant principles of international law provide adequate guidance in the present case." *Id.* at para. 611.

<sup>11</sup> *Akayesu* Appeals Judgement, para. 93-97.

<sup>12</sup> *Ntakirutimana* Judgement, para. 870-871.

<sup>13</sup> *Celebici* Appeals Judgement, para. 611.

<sup>14</sup> *Ntakirutimana* Judgement, para. 871.

<sup>15</sup> *Akayesu* Appeals Judgement, para. 95.

<sup>16</sup> *Akayesu* Appeals Judgement, para. 96.

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prosecute the Accused, the Chamber does not find it necessary to consider the additional question of whether there were other similarly situated persons who were not prosecuted or against whom the prosecutions were discontinued.<sup>17</sup>

28. The Chamber concurs with this reasoning. As mentioned above, the Defence has not met its burden of showing the Prosecution's impermissible motive in indicting and continuing to prosecute the Accused Ndindiliyimana. The Chamber, thus, does not take into consideration the additional issue of whether Defence established that other similarly situated persons, namely the RPF, were not prosecuted.
29. Finally, for the above reasoning, the Chamber finds no merit in the Defence contention of prosecutorial abuse of discretion through selective prosecution. Consequently, the Chamber need not reach a determination on possible remedies, either stay of process or a reference to the Security Council. Thus, the Chamber does not consider the Defence submissions on making a reference to the Security Council as an alternative remedy.

**FOR THE FOREGOING REASONS, THE TRIBUNAL:**


**DISMISSES** the Motion in its entirety.

Arusha, 26 March 2004



Arlette Ramaroson

Presiding Judge



William H. Sekule

Judge



Solomy Balungi Bossa

Judge



<sup>17</sup> *Ntakirutimana* Judgement, para. 871.